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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. [redacted] 195

CHEMICAL TANK LINES, INC., A Corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

On Appeal From the Supreme Court of Appeals of West Virginia

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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No. 1533

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APPELLANT'S BRIEF

ARGUMENT

In Appellee's brief, page 1, paragraph 1A, Appellee is mistaken in its designation of the bond given there as merely a suspending bond. As shown on page 3A, the bond required that if need be the penalty was Five Thousand ($5,000.00) Dollars, and then provided if Appellant Chemical Tank Lines, Inc. "shall well and

truly pay all such damages as any person may sustain . . . then this obligation to be void; else to remain in full force." This did, of course, include costs, as that was the only damage except possible interest which could be sustained. Obviously then this bond could only have been a cost bond, particularly when one considers that the judgment in the trial court was in the amount of $350,000.00.

Appellant is not in error, as contended by Appellee at page 2, paragraph B of his Motion, in that the prayer of Appellant Chemical Tank Lines was "that it be awarded an Appeal, if such be proper, or a Writ of Error, if such be proper, and in either event, be granted Supersedeas to the judgment below."

As to paragraph D, page 2 of Appellant's motion on 7 A the Court in its Order stated, "and presented to the Court its Petition praying for an Appeal from and *supersedeas* to a judgment of the Circuit Court of Kanawha County . . . which being seen and inspected by the Court, the appeal and supersedeas prayed for is granted, but *it* is not to take effect until the petitioner, or some person for it, shall have given . . . bond . . . conditioned according to law." (Italics added).

It will be noted that the Court used the words, "it is not to take effect", meaning, of course, the supersedeas, and did not use the word, "they", which would be the proper word if meant to apply to "appeal *and* supersedeas."

Statement E, page 3 of Appellee's Motion likewise is incorrect, in that the question was raised in both the trial and appellate courts that the ruling of the trial court in granting Instruction 12 was in violation of the

constitutional rights of appellant, and the Constitutions of the State of West Virginia and the United States of America, and further that such construction places an unlawful burden on Interstate Commerce.

Appellant did take exception on constitutional grounds to the allowance of Appellee's Instruction 12 as is reflected on page 2061 of the typewritten transcript of the trial court proceedings. (See Appendix hereto). Appellant's counsel stated that to hold that the trucking industry which hauls trailers by tractors involves an unreasonable risk of harm to others, is unconstitutional under the Constitution of the United States of America and the Constitution of West Virginia because it would involve the taking of property without due process of law and would place an undue burden on Interstate Commerce. In the Circuit Court of Kanawha County in the "Brief of Appellant" page 80, appears the following:

> "Therefore, the trucking industry is a legally permissible industry by virtue of the laws of the United States. We raised the question below and raise it again, that to deprive that industry of its proper rights is violative of its constitutional rights, under both the Federal and State Constitutions."

And in the Supreme Court of Appeals of West Virginia in Appellant's brief, it is stated on page 34:

> "The defendant contended in the trial court, in the Circuit Court and contends in this court that such a holding without any evidence to support it, is taking the defendant's property without due process of law and violative of the Constitution of the United States and violative of the Constitution of West Virginia."

The question of the constitutionality of the Court's interpretation of Section 428, Restatement of the Law of Torts, as will be reflected in the record, was raised properly in the trial court of Kanawha County, on Appeal to the Circuit Court of Kanawha County, and on Appeal to the Supreme Court of Appeals of West Virginia. It can be agreed that this point was not passed upon by the Supreme Court of Appeals of West Virginia, which is Appellant's complaint herein; namely, that the Appeal was dismissed without deciding and passing upon this important and properly raised constitutional question.

Article 8, Section 1, of the Constitution of West Virginia provides that "The judicial power of the State shall be vested in the Supreme Court of Appeals * * *."

Article 5, Section 1 of the same Constitution provides that the "Legislative, Executive and Judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; * * *." *West Virginia State Bar* v. *Earley,* 144 W.Va. 504, 109 S.E. 2d 420 held that the legislature cannot restrict or impair the power of the Courts while *Sims* v. *Fisher,* 125 W.Va. 512, 25 S.E. 2d 216, in construing Article 5, Section 1, held that the legislature cannot commit to the judiciary powers which are primarily legislative.

Recently, on May 14, 1968, in *Cohn et al.* v. *Borchard Affiliations,* the Appellate Division, First Department, of the Supreme Court of the State of New York cited as 289 N.Y.S. 2d 771, in a split decision held, that an enactment by the New York State Legislature of a Rule of Civil Procedure precluding the dismissal

of an action for failure to prosecute unless certain conditions had been met, was unconstitutional as constituting an infringement and invasion by the legislature upon the power of the Court to regulate its own business and the calendar.

The Supreme Court of the State of New York and the Supreme Court of Appeals of the State of West Virginia are both constitutionally created Courts with the Constitutions of both States providing for a separation of the powers of the Judicial and Legislative branches of the States. The legislature of the State of West Virginia in enacting Chapter 48, Article 5, Section 318, set forth on page 5, Appellant's Jurisdictional Statement unlawfully invaded and infringed upon the power of the judiciary in violation of Articles 5 and 8, Sections 1 of the Constitution of the State of West Virginia.

There is no basis to Appellee's contention that the Appeal does not present a substantial Federal question. Substantial Federal questions have been raised by Appellant in its Jurisdictional Statement (3 - 4).

The Federal questions sought to be reviewed here (mainly the dismissal of the Appeal by the Supreme Court of Appeals of West Virginia) were timely raised. They could not and did not arise until the Order of the Supreme Court of Appeals of West Virginia was entered on March 20, 1968, although Appellant did in the trial court raise the question of the constitutionality of Appellee's Instruction 12.

The principal Federal question raised herein was passed upon by the Supreme Court of Appeals of West Virginia. It was timely brought to the attention of

that Court in a Motion to Reconsider and Reinstate the appeal and to set aside the Order of March 20, 1968 which dismissed the appeal and supersedeas. That Court by its Order of March 25, 1968, therefore denied the Appellant its constitutional rights, both State and Federal, when it refused to reconsider the matter. No particular form of words or phrases has ever been declared necessary in which the claim of Federal right must be asserted. It is sufficient if it appears from the record that such rights were specially set up and claimed in the State Court in such manner as to bring them to the attention of that Court.

The judgment of the highest court of West Virginia did not rest on an adequate non-federal basis as urged by Appellee. It is a pulling up of oneself by one's boot straps to say that the West Virginia Court has previously held that the posting of the bond within a required time is necessary to establish jurisdiction, as that is the very issue in question.

It is a condition precedent to the adoption of such statute and procedural rules that they conform to the Constitution of the State of West Virginia and that they do no violence to the Constitution of the United States of America and where, as in this case, the statute clearly invades the power and jurisdiction of the Supreme Court of Appeals of the State of West Virginia such cannot be the basis for a valid dismissal of Appellant's Petition.

An Appellate Court cannot be the final arbitrator of its own rules, if such rules violate the constitutional rights, either State or Federal, of a person aggrieved.

The Appeal in this case was properly taken and this was recognized by the Supreme Court of Appeals for West Virginia when it granted the Appeal. Appellee has cited *John* v. *Paullin,* 231 U.S. 583, 58 L. Ed. 381, and has quoted extensively from that opinion on pages 9 and 10 of its brief. That case quotes with approval *Newman* v. *Gates,* 204 U.S. 89, 51 L. Ed. 385, in which the Supreme Court declined to review a judgment of dismissal by a state Court. However, in *Newman, supra,* the Court said:

> " 'Had the appeal been properly taken, it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court.' "

It is the position of Appellant that an appeal was properly taken to the Supreme Court of Appeals for West Virginia and it is submitted that this Court should therefore resolve the Federal question which involves a denial in the state court of Appellant's constitutional rights. *Deena Products Company* v. *United Brick and Clay Workers of America, et al.,* 195 F. 2d 612, 6 Cir., cert. denied, 344 U.S. 822, 97 L. Ed. 640, 73 S. Ct. 21, as cited in both Appellee's Motion and Brief does not involve a situation relevant to the facts in this case. It is clear that a Circuit Court of Appeals under Rule 73(a) of the Rules of Civil Procedure is required to dismiss an untimely filed appeal. However, as Rule 73 states, the failure of an Appellant to take any step other than the timely filing of a Notice of Appeal does not affect the validity of the appeal, but is ground for such

action as the Court of Appeals deems appropriate. The failure to file a bond on appeal or a supersedeas bond, Rule 73 (c) and (d) has not been held to be jurisdictional and grounds for a mandatory dismissal. On the contrary, the Circuit Courts, on application by the Appellee where no bond has been furnished by Appellant, will require Appellant to furnish such a bond and will give him time to do so. The West Virginia statutory provisions governing the condition and time for filing bond is unconstitutional so far as it provides for a mandatory dismissal of an appeal, once allowed, for failure to file a timely bond.

Appellee's argument that federal basis for Court determination cannot be predicated on a Motion for Rehearing is completely without merit. This was the first time that the issue of the dismissal of the appeal for failure to file a timely bond could have been brought to the attention of the West Virginia Court.

On Page 17 of Appellee's brief, counsel for Appellee denies that there was any agreement between counsel for the Appellee and counsel for the Appellant to the end that the Appellant would not be required to file a bond. In view of the sharp disagreement between counsel for the Appellee and counsel for the Appellant, it is submitted that at the least, the Supreme Court of Appeals of the State of West Virginia should have ordered this issue to be remanded to the trial court for the taking of evidence.

All other matters referred to by Appellee, it is submitted, have been adequately covered in Appellant's Jurisdictional Statement. Appellant urges that these

Motions be denied and that this Court note probable jurisdiction and thereafter hear this case on its merits.

Respectfully submitted,

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APPENDIX

So that the Court will not have to search the voluminous record, we take the liberty of attaching as Appendix hereto those parts of the transcript of the trial proceedings which definitely show that the constitutional question was fully raised in the trial court.

On page 20 of the Brief, Section 3, there is a contention that the question of Section 428 was not raised below. The instruction given was, page 2066 of the transcript:

> "Plaintiff's Instruction No. 12—The Court instructs the jury that under the law in this case Chemical Tank Lines, Inc., is liable for any negligent acts of Dale Samples, and any negligent acts of Dale Samples while operating the tractor-trailer in which Edward Holstine was injured, is to be considered by the jury as negligence of Chemical Tank Lines.
>
> "You are therefore accordingly instructed that because of the stipulation in this case that Dale Samples was negligent in operating the tractor-trailer, and therefore if you believe from a preponderance of the evidence in this case that Dale Samples' negligence proximately contributed to the accident in question and to Edward Holstine's injuries then Chemical Tank Lines, Inc. is chargeable with the negligence of Dale Samples and your verdict may be for the plaintiff. Edward Holstine and against the defendant, Chemical Tank Lines."
>
> Mr. Palmer (counsel for the defendant below): "We have our objection to plaintiff's instructions Nos. 12 and 14 as follows:
>
> 1. There is no evidence upon which to base it.
>
> 2. It creates liability against the defendant Chemical Tank Lines without fault on its part.

3. It purportedly is based upon Section 428 of Restatement of Torts.

4. This section is based upon the premise the liability can be predicated where the 'activity shall involve an unreasonable risk of harm to others.'

5. To hold that the trucking industry which hauls trailers by tractors involves an unreasonable risk of harm to others is unconstitutional under the Constitution of the United States and the Constitution of West Virginia for the following reasons:

   a. To take property without due process of law.

   b. It places an undue burden on Interstate Commerce.

   c. There is no evidence by statistics or otherwise to support any such finding that the trucking industry creates an unreasonable risk of harm to others. In fact, statistics prove the drivers of the trucking industry are more careful than an ordinary and average driver of an automobile.

   d. Such section was created for injuries to the public using the highway and not the employees of the trucking industry."

At the bottom of the transcript, page 2068, it is shown that this was substituted for the original number 12, "This is a new number 12," and counsel for the then plaintiff stated: "We will take it that all of your previous objections cited on the record will be cited to the new instruction number 12."

"MR. PALMER: It is repetitious of Instruction No. 12 and it does not correctly state the law of respondeat superior and it holds as a matter of law the master is responsible for his acts.

"THE COURT: Do you need Instruction No. 12?

"MR. PREISER: I will substitute this one for Number 12, and this is substituted. This is a new Number 12 and we will take it that all your previous objections cited on the record will be cited to the new Instruction No. 12.

"MR. PALMER: I do move all my objections to the old Number 12 and all my argument of law be considered by the Court as objections to and arguments of law against the giving of the new Number 12, and that the Court permit the old Number 12 be made a part of the record for identification so that we will know what we were arguing about originally.

"THE COURT: All right."

The defendant offered its Instruction Number 28, at page 2043 as follows:

"The Court instructs the jury that a corporation carrying on an activity which can be lawfully carried on under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to others by the negligence of contractor employed to do work in carrying on the activity.

"Therefore, you are instructed that if you determine from the evidence that Brumfield was a contractor employed to carry on the activity as an inpendent contractor for Chemical Tank Lines, who operated under a franchise granted by public authority, then Chemical Tank Lines can be liable for the acts of Brumfield and his employees and their negligence, if any, only if the activity of operating tractor-trailer vehicles over the highways involves an unreasonable risk of harm to others, and not otherwise."

This instruction brings into focus the exact questions raised in plaintiff's Amended Instruction Number 12.

At page 2021, defendant's Instruction Number 14 was refused, which stated as follows:

> "The Court instructs the jury that the owner of a vehicle owes to a stranger who rides in it only the duty not to use wilful and wanton care not to injure him; that is, the same duty owed a trespasser.
>
> "Therefore, if you find from a preponderance of the evidence that the plaintiff, Holstine, was not an employee of Chemical Tank Lines and was not an employee of Brumfield, as he has claimed from the witness stand, the only duty owed him by Chemical Tank Lines since he was a stranger to them, was not to wilfully or wantonly injure him.
>
> "And if you believe from the evidence, that Chemical Tank Lines did not wilfully or wantonly injure the plaintiff, Holstine, then he cannot recover against Chemical Tank Lines."

Thus we specifically show that this constitutional question was raised in the trial Court both by objections to the giving of the plaintiffs below in Instruction No. 12 and by submitting to the Court instructions covering the points which were refused.